

Enforcing Washington Judgments in British Columbia: "Reciprocating State" Status for Washington Will Make Enforcement Easier

*Kenneth O. Eikenberry**

James M. Johnson

Laura L. Wulf

Canada has long been one of the most important trading partners for the United States.¹ Canada, primarily British Columbia, is the second most important international trading partner of Washington State.² In 1986, trade between Washington and Canada exceeded \$3.5 billion dollars.³

This trade relationship will be enhanced by the fact that both the United States Senate and the Canadian Parliament have ratified the United States-Canada Free Trade Agreement, which went into effect on January 1, 1989.⁴ By its terms, this agreement drastically reduces or eliminates tariffs on commerce between the two nations within the next ten years.⁵ As a result, the ratification signals the beginning of a period of increased commercial activity between American and Canadian business people.⁶ This is particularly true between Washington and British Columbia where tariffs have prevented competi-

* Kenneth O. Eikenberry, Washington State Attorney General; James M. Johnson, Senior Assistant Attorney General, Chief, Special Litigation Division; Laura L. Wulf, Clerk, Special Litigation Division. The authors thank Bud Smith, British Columbia Attorney General, the Attorney General's staff, and James E. Beaver, Professor of Law, University of Puget Sound, for their generous advice and assistance.

1. Washington State Dep't of Trade and Economic Dev., *The Canada Connection*, Vol. 1, No. 1 TEAM WASHINGTON NEWS 10 (Summer 1989) [hereinafter *Canada Connection*, Part 1].

2. *Id.*

3. *Id.* at 10-11. This figure is in United States dollars. The only nation with which Washington has a greater volume of trade is Japan. Washington State Dep't of Trade and Economic Dev., *The Canada Connection*, Vol. 1, No. 2 TEAM WASHINGTON NEWS 1, 12 (Fall 1989) [hereinafter *Canada Connection*, Part 2].

4. *Canada Connection*, Part 1, *supra* note 1, at 1.

5. *Id.* at 9.

6. *Id.* at 10.

tion between the adjoining state and province.⁷

Increased trade will benefit the economies on both sides of the border. However, with the increased trade, disputes will inevitably increase. The parties involved will want a speedy, fair, and efficient method of settling these disputes. A final judgment, enforceable in either state or province, is one means of improving the process.

On July 5, 1989, the Executive Council of the Province of British Columbia passed an Order in Council declaring the State of Washington the first American "reciprocating state"⁸ for purposes of Part 2 of British Columbia's Court Order Enforcement Act.⁹ As a result, subject to certain requirements, most judgments of Washington State courts are now more easily and quickly recognized and enforced by the British Columbia Supreme Court.¹⁰

The order was the result of a formal request from the Washington State Attorney General to the Attorney General for British Columbia.¹¹ The request was prompted by problems, real and anticipated, in litigation involving Washington and British Columbia residents.

Prior to this declaration, successful litigants whose attempts to enforce Washington judgments in British Columbia were unsuccessful were required to commence new proceedings in British Columbia courts. Such relitigation is particularly problematic in commercial transactions where the delay and added expense can be devastating. Therefore, by reducing the probability of relitigation, reciprocity will facili-

7. For example, it has been calculated that tariffs on Washington's wine, beer, poultry, and dairy products made these items up to 57% more expensive in Canada. *Id.*

8. Order of the Lt. Governor in Council, Order in Council No. 980 (July 5, 1989) [hereinafter Order].

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that, being satisfied that reciprocal provisions are made by Washington State (one of the United States of America), Washington State is declared to be a reciprocating state for purposes of Part 2 of the *Court Order Enforcement Act*.

9. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, §§ 30-41 (1979).

10. At the outset, however, it is important to note that the Court Order Enforcement Act only offers "a speedy method of enforcement of those judgments that are enforceable." Swan, *The Canadian Constitution, Federalism and the Conflict of Laws*, 63 CAN. B. REV. 271, 273 (1985). The potential enforcement problems will be discussed in Part III of this Article.

11. Letter from Kenneth O. Eikenberry, Washington State Attorney General, to Brian Smith, British Columbia Attorney General (Oct. 2, 1987).

tate the expansion of trade and commerce between Washington and British Columbia.

Part I of this Article will discuss the importance of foreign judgment enforcement. In Part II, the procedural requirements of enforcing a Washington judgment in British Columbia will be outlined. Finally, in Part III, potential enforcement problems for Washington judgment creditors under British Columbia's Court Order Enforcement Act will be considered.

I. THE ABILITY TO ENFORCE JUDGMENTS IN A FOREIGN FORUM IS CRITICAL FOR WASHINGTON JUDGMENT CREDITORS

The last stage in a fully litigated legal dispute is the collection of the judgment by the prevailing party. Even when litigation and judgment enforcement occur in a single jurisdiction, this can be the most difficult step in the litigation process. The problem is compounded when a litigant attempts to enforce a judgment in another country. Enforcement problems might be alleviated by a contractual choice of forum clause.¹² If, for example, the parties choose Washington as the forum jurisdiction, the parties will litigate under the law of the state of Washington. Ultimately, however, any Washington judgment obtained by a prevailing plaintiff will have to be enforced in the jurisdiction where the defendant's assets are located.

It has long been possible to enforce the judgments of British Columbia courts in Washington under Washington's Uniform Foreign Money Judgments Recognition Act.¹³ However, prior to the recent order made under British Columbia's Court Order Enforcement Act, Washington judgment creditors taking Washington judgments to British Columbia courts have had difficulty enforcing those judgments. British Columbia courts often simply refused to recognize the Washington judgments because the provincial government did not recognize Washington as a reciprocating state. Washington judgment creditors were forced either to forego collecting the debt or to relitigate the case in a British Columbia court. Fortunately,

12. Choice of forum clauses are negotiated between the contracting parties. Under the British Columbia approach to enforcement of foreign judgments, where a judgment debtor has contracted to submit himself to the forum in which the judgment was obtained, the judgment will be enforced by the British Columbia courts. *Weiner v. Singh*, 22 C.P.C. 230, 234 (B.C. County Ct. 1981) (quoting *Emmanuel v. Symon*, 1 K.B. 302, 309 (1908)).

13. See WASH. REV. CODE § 6.40.010-.915 (1989).

the task of enforcing Washington judgments in British Columbia courts will be easier now that Washington is a reciprocating state under British Columbia's Court Order Enforcement Act.¹⁴

A. *The Need for Recognition by the Foreign Court*

In order to enforce a foreign judgment, a court must first recognize the judgment.¹⁵ Historically, principles of sovereignty have made some courts reluctant to recognize judgments rendered by the courts of foreign nations.¹⁶ There is a tension between the need to protect sovereign interests and the need for universal recognition of foreign judgments:

The principle of territorial sovereignty is said to prevent foreign judgments from having any direct operation as such in any of the Canadian provinces. This attitude is principally due to a lack of confidence in other legal systems. It may be difficult for the enforcing court to ascertain the independence and legal ability of the foreign judge, and to assess the reliability of the foreign legal system. . . . To admit the principle of universal recognition and enforcement of foreign judgments would result in recognizing in a foreign judge a power superior in many instances to that possessed by the local legislature. For these reasons adequate safeguards must be provided. On the other hand a foreign judgment is a fact which cannot be ignored.¹⁷

By ignoring foreign judgments, courts prejudice the interests of foreign creditors who, like all creditors, want to protect themselves against the risk of their debtor's insolvency or any other impediment to the enforcement of their claims.¹⁸ A secondary effect of nonrecognition by a state is that it makes it less likely that the foreign forum will recognize the judgments of that state.¹⁹

The United States and Canada are similar in that enforce-

14. Court Order Enforcement Act, B.C. REV. STAT. ch. 75 (1979).

15. Castel, *Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada*, 17 MCGILL L.J. 11, 12 (1971).

16. See *id.* at 11.

17. *Id.*

18. See Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 4 (1988).

19. For example, in the case of *Hilton v. Guyot*, 159 U.S. 113 (1895), the United States Supreme Court stated "that judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this

ment of foreign judgments is not expressly governed by federal law in either country. Instead, state law in the United States, and provincial law in Canada, govern the recognition and enforcement of foreign judgments.²⁰

B. Use of State or Provincial Legislation to Aid in Enforcing Foreign Judgments

In 1975, the Washington State Legislature enacted the Uniform Foreign Money Judgments Recognition Act.²¹ The legislature, by this enactment, attempted to ease enforcement of British Columbia judgments in Washington.²² Under the Act, the expectation was that British Columbia would reciprocate and Washington judgment creditors would be able to enforce Washington judgments in British Columbia.²³ Unfortunately, mere passage of the Act proved insufficient. Unlike the Act, British Columbia's Court Order Enforcement Act requires each foreign state to be separately declared a reciprocating state.²⁴

In 1987, the Washington State Attorney General formally requested that British Columbia issue an Order in Council recognizing Washington as a reciprocating state.²⁵ To become a

country, but are prima facie evidence only of the justice of the plaintiff's claim." *Id.* at 227. See also Juenger, *supra* note 18, at 31-33.

20. At least one commentator, however, sees the United States as providing more of a federal framework for resolution of conflict of laws questions regarding enforcement of judgments. The reason for this is that jurisdictional issues are framed in terms of "constitutional" issues that can be applied across the nation rather than on a strictly province by province basis as is the case in Canada. Swan, *supra* note 10, at 272.

21. WASH. REV. CODE § 6.40.010-.915 (1989).

22. See *id.*

23. Although British Columbia is not specifically mentioned in RCW 6.40, one of the principal reasons for enacting that law was the situation between the State of Washington and British Columbia. The bill was intended to rectify immediately the problem of British Columbia's nonrecognition of Washington judgments because of its reciprocity requirement. (House Judiciary Committee Bill Analysis for ESB 2108, 5-14-75).

Memorandum from Diane Noda, Legal Intern, House Judiciary Committee, to Representative Pat McMullen (July 16, 1987).

24. "Where the Lieutenant Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement of judgments given in the Province, *he may by order declare it to be a reciprocating state for this Part.*" Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 39(1) (1979) (emphasis added).

25. Letter from Kenneth O. Eikenberry, Washington State Attorney General, to Brian Smith, British Columbia Attorney General, (Oct. 2, 1987). The Washington State Attorney General's Office is currently trying to establish the same reciprocating state status with other Canadian provinces.

reciprocating state, as the term is used in British Columbia's Court Order Enforcement Act, Washington first had to meet the British Columbia requirement that it recognize and enforce judgments of British Columbia courts. Washington's adoption of the Uniform Foreign Money Judgments Enforcement Act met this requirement. Thus, British Columbia complied with the Attorney General's request and the Order in Council became effective on July 6, 1989.²⁶ Consequently, Washington now enjoys reciprocating state status.

Under British Columbia's Court Order Enforcement Act, a Washington judgment creditor must apply to the British Columbia Supreme Court to register the Washington judgment. Normally, the judgment will be registered if the application is in the proper form and no defects existed in the original proceeding. The possible defects are set out in section 31 of the Court Order Enforcement Act.²⁷

A British Columbia court will not register a judgment if the original court acted without jurisdiction, without authority to adjudicate the cause of action, or without the ability to hold the judgment debtor liable.²⁸ A determination that the original court lacked jurisdiction over the judgment debtor reflects either that the judgment debtor was not carrying on business within the jurisdiction of the original court or was not a resident of the state of the original court. In either situation, if the judgment debtor did not appear or submit²⁹ to the jurisdiction of the original court, the British Columbia court will find that personal jurisdiction over the judgment debtor was lacking and the judgment will not be registered.³⁰ Additionally, if the judgment debtor was not duly served with process of the original court or did not appear, a judgment may not be registered.

These requirements are similar to those of Washington's Uniform Foreign Money Judgments Recognition Act. In order to enforce a judgment under Washington's Act, the plaintiff must show that, in the original action, the rendering court had both subject matter jurisdiction and jurisdiction over the parties or the res.³¹

26. Order, *supra* note 8.

27. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(a)-(g) (1979).

28. *Id.* § 31(6).

29. See Castell, *supra* note 15, at 30-45.

30. But see *infra* text accompanying notes 91-102.

31. WASH. REV. CODE § 6.40.040(1)(b)-(c) (1989).

Furthermore, both Acts impose three additional requirements before a foreign judgment will be registered. First, the judgment must not have been obtained by fraud.³² Second, the judgment must be final and conclusive.³³ Finally, the judgment must not violate public policy in the eyes of the Washington or British Columbia court.³⁴ The two acts are also similar in that neither act applies to judgments for alimony or child support.³⁵

The one major difference between the two acts is the requirement, found only in British Columbia's Court Order Enforcement Act, allowing the British Columbia court to refuse recognition if the "judgment debtor would have had a good defence if an action were brought on the judgment."³⁶ This provision may cause delay in obtaining recognition or it may require relitigation of the case in British Columbia.

Thus, although some problems may still be encountered by a Washington judgment creditor, the inclusion of Washington as a reciprocating state under British Columbia's Court Order Enforcement Act greatly increases the likelihood that Washington judgments will be enforced. However, to prevail in an enforcement proceeding, the procedure for registering Wash-

32. Uniform Foreign Money Judgments Recognition Act, *Id.* § 6.40.040(2)(b); Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(d) (1979).

33. Uniform Foreign Money Judgments Recognition Act, WASH. REV. CODE § 6.40.020 (1989); Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(e) (1979). The British Columbia statute requires either that an appeal must not be pending or that the time for appeal must have expired.

34. Uniform Foreign Money Judgments Recognition Act, WASH. REV. CODE § 6.40.040(2)(c) (1989); Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(f) (1979).

35. Uniform Foreign Money Judgments Recognition Act, WASH. REV. CODE § 6.40.010(2) (1989); Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 30(1) (1979).

36. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(g) (1979).

The term "good defence" is not specifically defined either in the statute or in British Columbia case law. After acknowledging that the law on this matter differs in the various Canadian provinces, Justice McIntyre of the British Columbia Supreme Court attempted to define what the phrase means in the law of British Columbia:

Generally speaking apart from statutory defences, the foreign judgment will be enforceable unless it is shown that it was obtained by fraud, that it is contrary to natural justice or that it is repugnant to public policy However, in my view, there is available a fourth defence in the Province of British Columbia. I refer to *Boyle v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 213, as authority for the proposition that our courts will refuse to enforce a foreign judgment taken by default where *manifest error* in the judgment is shown.

Re Gacs and Maierovitz, 68 D.L.R.2d 345, 350-51 (1968) (emphasis added). See *infra* text accompanying notes 61-68.

ington judgments in British Columbia must be carefully followed.

II. PROCEDURAL REQUIREMENTS FOR REGISTERING A WASHINGTON JUDGMENT IN BRITISH COLUMBIA

To enforce a Washington judgment in British Columbia, a judgment creditor must first apply to the British Columbia Supreme Court³⁷ for registration within six years of the date of the judgment.³⁸ This application must include a certificate from the court which issued the judgment.³⁹ This certificate

37. The British Columbia Supreme Courts are a division of courts that hear trial level cases. Supreme Court Act, B.C. REV. STAT. ch. 397, § 8 (1979). The British Columbia Court of Appeal is the equivalent of the Washington State Supreme Court. Court of Appeal Act, S.B.C. ch. 7, § 6 (1982).

38. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(1) (1979).

39. The form of the certificate is set out in schedule 2 of the Court Order Enforcement Act.

CERTIFICATE

Canada:

Province of British Columbia

It is certified that, among the records of the court of _____, at _____, before the Honorable _____, a justice [judge] of the court, in the Procedure Book there is record of an action, numbered as No. _____, between _____ (plaintiff(s)) and _____ (defendant(s)).

1. The writ of summons [or statement of claim, as the case may be] was issued on _____ [month, day], 19____, and proof was furnished to this court that it was served on the defendant by delivery of a copy of it to him and leaving it with him.

2. No defence was entered, and the judgment was allowed by [proof, default or order]

[OR]

2. A defence was entered and judgement was allowed at the trial [or as the case may be]

3. Judgment was given on _____ [month, day], 19____.

4. Time for appeal has expired and no appeal is pending [or an appeal against the judgment was made and was dismissed by the Court of Appeal and the time for any further appeal has expired and no further appeal is pending, or as the case may be].

5. Further details if any.

6. Particulars:

Claim as allowed	\$ _____
Costs to judgment	\$ _____
Subsequent costs	\$ _____
Interest	\$ _____
Paid on	\$ _____

And the balance remaining due on the judgment for debt, interest and costs is \$ _____

In testimony of which we have fixed the seal of the court at _____, _____ [month, day], 19____.

[Seal]

A Justice [Judge] of the Court of _____.

must be signed by either a Washington judge ordering the judgment or the court clerk, and the seal of the issuing court must be affixed to it.⁴⁰ The certificate must also include assurances (1) that the defendant was properly served, (2) that either the defendant defaulted or was adjudged at fault, and (3) that the judgment is no longer subject to appeal.⁴¹ Additionally, the certificate must state the amount of the claim which was allowed, the costs incurred which are included in the judgment and the amount of interest accrued.⁴²

It is technically permissible to use a form different from that prescribed. If the required information is included in a form different from that described in the statute, the proposed certificate is acceptable so long as the court seal and the required signatures appear on the certificate.⁴³

In addition to having a certificate of judgment, the application for registration of the judgment must also be accompanied by an affidavit in support of the application.⁴⁴ The affidavit must exhibit a certified copy of the judgment under the seal of the court which issued the judgment. Additionally, the person signing the affidavit must state to the best of his belief:

(i) that the judgment creditor is entitled to enforce the judgment;⁴⁵

(ii) that the judgment does not fall within any of the cases in which, under section 31 of the Court Order Enforcement Act, a judgment cannot be registered;⁴⁶

Or

Clerk of the Court of _____.

Court Order Enforcement Act, B.C. REV. STAT. ch. 75, Schedule 2 (1979).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Lornal Constr. v. Lawrence*, 47 C.P.C. 99, 105 (1984 B.C.S.C.).

44. B.C. SUP. CT. R. 54(2). In a recent case, the British Columbia Supreme Court set aside the registration of a judgment because the affidavits did not meet the requirements of Rule 54. *Lornal*, 47 C.P.C. at 105. In *Lornal*, the court noted that "[t]he affidavit in support of the registration does not meet the requirements of any of the four numbered paragraphs of the Rule." *Id.* The deponent had not stated that, to the best of his belief, the judgment creditor was entitled to enforce the judgment, nor did he state that the judgment did not fall within any of the circumstances in which it could not be registered. Furthermore, he did not state the names and addresses of the judgment debtor and creditor nor did he state the amount presently owing on the judgment. *Id.* at 104.

45. B.C. SUP. CT. R. 54(2)(b)(i).

46. B.C. SUP. CT. R. 54(2)(b)(ii). The reasons for which a judgment cannot be registered are those listed in Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(a)-(g) (1979).

(iii) the full name, trade or business, and usual or last known place of abode or business of the judgment creditor and judgment debtor respectively, so far as is known to the deponent;⁴⁷ and

(iv) the amount presently owing on the judgment.⁴⁸

Furthermore, the order for registering the judgment must be in the proper form.⁴⁹ In most cases, the application is made *ex parte*. Where it is made *ex parte* the order must state that the defendant is given one month from the time he has notice of the registration to apply to set the registration aside.⁵⁰

After the procedural requirements are satisfied, the British Columbia court will review the substance of the judgment according to the substantive requirements of the Court Order Enforcement Act.

III. BRITISH COLUMBIA SUPREME COURT REVIEW OF WASHINGTON JUDGMENTS: POTENTIAL APPLICATION PROBLEMS

Under section 31(6) of the Court Order Enforcement Act,⁵¹ there are seven circumstances in which registration will not be granted.⁵² The burden is on the judgment debtor to

47. B.C. SUP. CT. R. 54(2)(b)(iii).

48. B.C. SUP. CT. R. 54(2)(b)(i)-(iv).

49. This form, Form 59, can be found in Appendix A of the British Columbia Court Rules. The information required on the form includes the date and sum of judgment and the court that entered the judgment.

ORDER GRANTING LEAVE TO REGISTER FOREIGN JUDGMENT (Reciprocal Enforcement of Judgments Act)

Before the Honorable Mr. (Justice) the ____ day of ____, 19____. Upon the Application of ____ coming on before me on ____ and upon hearing ____, Counsel for the applicant, and ____, Counsel for ____:

This Court orders that the judgment dated the ____ day of ____, 19____, of [name of court] whereby it was adjudged that [name and address of judgment creditor] recover from [judgment debtor] the sum of \$____ for debt [or as the case may be] and \$____ for costs, be registered in this Court.

[Add order if obtained *ex parte*].

This Court further orders that the [judgment debtor] may apply to set aside the registration within one month after he has notice of it.

By the Court.

Registrar

B.C. SUP. CT. R. 54(3) app. A, Form 59.

50. *See id.*

51. B.C. REV. STAT. ch. 75, § 31(6) (1979).

52. (6) No order for registration shall be made if the court to which application for registration is made is satisfied that

prove that any of the listed circumstances exist,⁵³ as the judgment of the original court constitutes *prima facie* evidence of the debt.⁵⁴ The first three circumstances involve questions of jurisdiction and notice. The remaining four circumstances involve nonjurisdictional issues.

A. *Nonjurisdictional Requirements*

First, fraud, as referred to in the Court Order Enforcement Act,⁵⁵ deals with fraud in obtaining the judgment rather than fraud as related to the original cause of action.

A judgment obtained by fraud may be impeached, but it is extrinsic fraud, that is, a fraud of the type which deprives a person of an adequate opportunity to present his case in court which will vitiate a judgment. It is not fraud . . . which is intrinsic fraud . . . , that is, allegations going to the existence and substance of the cause of action.⁵⁶

-
- (a) the original court acted either
 - (i) without jurisdiction under the conflict of laws rules of the court to which application is made; or
 - (ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor;
 - (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;
 - (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court;
 - (d) the judgment was obtained by fraud;
 - (e) an appeal is pending or the time in which an appeal may be taken has not expired;
 - (f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court; or
 - (g) the judgment debtor would have a good defence if an action were brought on the judgment.

Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(a)-(g) (1979).

53. [T]he onus is on the respondents who seek to have the judgment set aside to satisfy the judge as to the grounds set forth in § 31(6). Unless they do so, the judgment, being *prima facie* proof of the debt, is entitled as a matter of comity, and by the provisions of the Act, to recognition and to registration.

Roglass Consultants v. Kennedy, 65 B.C.L.R. 393, 394 (1984).

54. *Id.*

55. B.C. REV. STAT. ch. 75, § 31(6)(d) (1979).

56. *Roglass*, 65 B.C.L.R. at 396.

Second, the judgment cannot be subject to appeal.

Third, the judgment cannot be for a cause of action which would not be enforceable in British Columbia for public policy reasons articulated in the province.⁵⁷ The British Columbia Supreme Court, however, has noted that merely because an action would fail in that province does not mean that an application to register that judgment would fail, so long as the judgment was validly obtained.⁵⁸ While a default judgment may be set aside,⁵⁹ the judgment is still a final judgment while it stands. Finality is defined as whether the judgment "can only be questioned in an appeal to a higher tribunal."⁶⁰

Finally, the foreign judgment will not be registered if the judgment debtor has a good defense to an action brought on the judgment.⁶¹ While defining a "good defence," is not a particularly easy task, at least one recent British Columbia case addressed the issue.⁶²

In *Central Trust Co. v. Messenger, Milchem and Milchem*,⁶³ the judgment debtor claimed a right of set-off against the creditor. The judgment debtor claimed that the

57. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(f) (1979). An example of a case in which a British Columbia court found that the public policy of the province had not been offended is *Canadian Imperial Bank of Commerce v. Brown*, 3 B.C.L.R.2d 270 (1986). In *Brown*, an Alberta judgment creditor brought the original action in an Alberta court to enforce a chattel mortgage. The cause of action in the Alberta court was based on an action that could not have been maintained in a British Columbia court. Specifically, British Columbia law states that the grantee of a chattel mortgage may seize the chattel or "sue to enforce his rights but may not do both." *Id.* at 271. One of the chattels had been seized before the judgment, so an action on the chattel could not be maintained in a British Columbia court. *Id.*

The British Columbia court, to which application for registration of the Alberta judgment was made, found that while the laws of British Columbia and Alberta were different, the Alberta law did not offend the public policy of British Columbia. Consequently, the judgment was registered. *Id.*

The Washington courts approach the issue of alleged violations of public policy in a manner similar to that of the British Columbia courts. The Washington Court of Appeals explained that "[t]he public policy of this state is found in its constitution, statutes and settled rules laid down by its courts; however, just because there is a difference between the laws of a foreign state and this state is not sufficient by itself to establish a violation of this state's public policy." *Untersteiner v. Untersteiner*, 32 Wash. App. 859, 863 n.3, 650 P.2d 256, 259 n.3 (1982) (emphasis added) (citing *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 301, 118 P.2d 985, 991 (1941).

58. *Brown*, 3 B.C.L.R.2d at 272.

59. *Boyle v. Victoria Yukon Trading Co.*, 9 B.C.R. 213, 222 (1902) (quoting Lord Herschell in *Nouvion v. Freeman*, 15 App. Cas. 1, 9 (1889)).

60. *Id.*

61. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(g) (1979).

62. See *Re Gacs and Maierovitz*, 68 D.L.R.2d 345 (1968).

63. 33 B.C.L.R.2d 34 (1988).

Alberta judgment at issue should not be registered in British Columbia because the claimed right of set-off was a good defense to the judgment and further that the defense had not been available in the original Alberta action.⁶⁴ The British Columbia court found that the judgment debtor had no right of set-off against the judgment creditor. Accordingly, the British Columbia judge dismissed the application to set aside the registration.⁶⁵

The decision in *Central Trust* sheds some light on the question of what constitutes a good defense. First, the defense raised must be one that could not have been raised in the original action.⁶⁶ Additionally, the defense must be one that could have been raised had the original action been litigated in British Columbia.⁶⁷ Since the defense raised in the *Central Trust* case could not have been raised in either Alberta or British Columbia, the defense of set-off was not effective.⁶⁸

The nonjurisdictional conditions imposed by section 31(6) of the Court Order Enforcement Act allow the judgment debtor to impeach the judgment of the issuing court. When the judgment debtor challenges a foreign judgment on the grounds of fraud, public policy considerations, or inability to raise a good defense, the registering court may examine the original proceeding for possible defects.⁶⁹ However, if the registering court finds no defects in the substantive method by which the judgment was obtained, the judgment debtor may also challenge the judgment on the basis of possible jurisdictional defects.

B. Jurisdictional Requirements

The jurisdictional requirements are found in the first three paragraphs of section 31(6).⁷⁰ Paragraph (a) requires that the Washington court have jurisdiction under either the

64. *Id.* at 37.

65. *Id.*

66. *Id.*

67. In *Pos v. Pos*, 61 B.C.L.R. 388 (1985), the court found that while a claim of set-off could be pleaded as a defense in some cases, the evidence must establish such a claim before it can be used as a good defense. The court in *Pos* found that the evidence had not established the claim of set-off and, therefore, the defendant debtor did not have a good defense. *Id.* at 395.

68. *Central Trust*, 33 B.C.L.R.2d at 37.

69. *Re Gacs and Maierovitz*, 68 D.L.R.2d 345, 350 (1968).

70. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(a)-(c) (1979); see *supra* note 52 (providing text of statute).

British Columbia conflict of laws rules or the law of Washington.⁷¹ Under paragraph (c), the judgment debtor must have been a resident or have been carrying on business in the State of Washington. Further, the judgment debtor must either have been "duly served" or have voluntarily appeared in the original action,⁷² but the judgment debtor need not have received personal service under this section.⁷³

The jurisdictional requirements of paragraphs (a) and (c) do not present major difficulties for the Washington judgment creditor. Paragraph (a) simply requires that the Washington court have subject matter jurisdiction over the cause of action and personal jurisdiction over the defendant debtor. Paragraph (c) only requires that the Washington court have personal jurisdiction over the defendant debtor, by way of the defendant either residing or carrying on business in the state, and that the defendant is duly served.

Conversely, the voluntary appearance requirement of paragraph (b) may present some difficulty for the Washington judgment creditor. Paragraph (b) states that if the judgment debtor was neither carrying on business nor ordinarily residing in the state of the original court and did not voluntarily appear or submit⁷⁴ during the proceedings to the jurisdiction of the original court, then the judgment will not be recognized.⁷⁵ The traditional common law rule, codified in this paragraph, is rather narrow.⁷⁶ Until recently, most British Columbia courts have strictly construed this jurisdictional rule.

One example of such strict construction is found in *Weiner v. Singh*.⁷⁷ In *Weiner*, a California resident was involved in an automobile accident with the defendant in California.⁷⁸ At the time of the accident, the defendant was a resident of

71. *Id.* § 31(6)(a).

72. *Id.* § 31(6)(c).

73. In *Re Gacs and Maierovitz*, 68 D.L.R.2d 345 (1968), the defendant debtor received substituted service when an officer of the sheriff's office left an order for substituted service at the defendant's residence. *Id.* at 347. The court reasoned that the term "duly served" in the statute rather than "personal service," as used in other parts of the statute, showed an intention by the legislature that "personal service" was not required under paragraph (c). *Id.*

74. Court Order Enforcement Act, B.C. REV. STAT. ch. 75, § 31(6)(b) (1979); see *supra* note 52 (providing text of statute).

75. *Id.*

76. Swan, *supra* note 10, at 273.

77. 22 C.P.C. 230 (1981).

78. *Id.* at 232.

the State of California.⁷⁹ However, when the action was commenced in California almost three years later, the defendant was a resident of British Columbia.⁸⁰ The defendant was served in British Columbia, but the defendant never appeared in the California action.⁸¹ A default judgment was subsequently obtained by the California plaintiff.⁸²

When presented with the California judgment, the British Columbia court refused to recognize the judgment.⁸³ The court based its decision on the general rule regarding enforcement of foreign judgments found in the leading case of *Emanuel v. Symon*.⁸⁴

In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of a foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of a plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.⁸⁵

The *Weiner* court found the *Emanuel* rule applicable to the California judgment. The defendant was not present in California when the action was commenced, and the defendant had neither voluntarily appeared in the action nor had he in any other way submitted to the jurisdiction of the California court. Consequently, the California court did not have jurisdiction over the defendant under paragraph (b), and the judgment could not be registered.⁸⁶

Traditionally, the jurisdictional rule from *Emanuel* has also been applied to cases involving actions between residents of different Canadian provinces. In *In Re Royal Bank of Canada*,⁸⁷ a British Columbia court set aside an ex parte order

79. *Id.* at 233.

80. *Id.* at 232.

81. *Id.* at 233.

82. *Id.*

83. *See id.* at 238.

84. 1 K.B. 302 (1908).

85. *Weiner*, 22 C.P.C. at 234 (citing *Emanuel*, 1 K.B. at 309). For further analysis of these five circumstances in which judgments will be enforced, see Castel, *supra* note 17, at 31-46.

86. *Weiner*, 22 C.P.C. at 238.

87. 3 W.W.R. 449 (1982).

directing registration of an Ontario judgment. The British Columbia court had previously ordered registration of the Ontario judgment, and the British Columbia judgment debtor's wages had been garnished.⁸⁸ In response to a motion, the registration of the Ontario judgment was set aside pursuant to section 31(6)(b) of the Court Order Enforcement Act.⁸⁹ The judgment debtor was not present in Ontario when the action was commenced and had not submitted to the jurisdiction of the Ontario court.⁹⁰ Therefore, the Ontario court did not have jurisdiction according to a literal interpretation of paragraph (b).

This strict construction of paragraph (b) has been relaxed in recent cases involving judgments from Canadian provinces. In *Marcotte v. Megson*,⁹¹ the British Columbia judge was confronted with an Alberta judgment arising from a case in which the British Columbia judgment debtor claimed that he was not present in Alberta at the commencement of the original proceeding, nor did he submit to the jurisdiction of the Alberta court.⁹² Nevertheless, the court, after an extensive analysis, allowed registration of the judgment.

The judge first considered the rules of the Alberta and British Columbia courts which provide for extraterritorial service in certain situations.⁹³ In both cases, extraterritorial service is permitted in breach of contract actions.⁹⁴ In *Marcotte*, the defendant was personally served in British Columbia pursuant to an order of the Alberta court where the action was commenced.⁹⁵ The defendant did not file a statement of defense, and a default judgment was entered by the Alberta court for unpaid wages owed the plaintiff.⁹⁶ The judgment debtor applied to have the Alberta judgment set aside based upon a lack of personal jurisdiction in the original proceeding.⁹⁷

The British Columbia court found that, despite the defendant's claim of lack of personal jurisdiction, the judgment could

88. *Id.* at 450.

89. *Id.* at 452.

90. *Id.* at 450.

91. 19 B.C.L.R.2d 300 (1987).

92. *Id.*

93. *Id.* at 304-05.

94. *Id.*

95. *Id.* at 302.

96. *Id.* at 305.

97. *Id.* at 306.

be registered in British Columbia. The court based its decision on the fact that as between Canadian provinces, the courts of British Columbia should recognize a jurisdictional basis that a British Columbia court would claim.⁹⁸ This principle is referred to as "jurisdictional reciprocity."⁹⁹

The principle of jurisdictional reciprocity has been discussed at length both in the Canadian literature¹⁰⁰ and in several British Columbia cases involving foreign judgment enforcement. Most recently, discussion of the principle appears in *Morguard Investments Ltd. v. DeSavoye*.¹⁰¹

Morguard involved a British Columbia judgment debtor who attempted to have an Alberta judgment set aside on the grounds that the Alberta court that ordered the judgment lacked personal jurisdiction over the defendant.¹⁰² In response, the court reasoned that the rule stated in section 31(6)(b) of the Court Order Enforcement Act should be expanded to include recognition of judgments in cases where the principle of jurisdictional reciprocity applies.¹⁰³ In effect, the court rejected the strict application of the traditional rule found in paragraph (b). The court, however, limited its decision to cases involving judgments from Canadian provinces.¹⁰⁴

Because *Morguard* limited the application of the new rule to Canadian judgments, Washington creditors may still encounter the same problem that confronted the California judgment creditor in *Weiner*. The traditional rule in *Emanuel*, as expressed in section 31(6)(b) of the Court Order Enforcement Act, may still be a barrier to enforcement. Therefore, the possibility remains that a Washington judgment will not be recognized if the British Columbia judgment debtor was not present in Washington at the time the Washington action was commenced or if he did not voluntarily appear or submit to the jurisdiction of the Washington court.

However, the fact that Washington is now a reciprocating state under the Court Order Enforcement Act creates a strong argument in favor of applying the new rule to Washington

98. *Id.* at 314-17.

99. *Id.* at 314.

100. See, e.g., Gilbert, *Reciprocity in the Recognition of Foreign Judgments*, 32 CAN. B. REV. 359, 379 (1954).

101. 27 B.C.L.R.2d 155 (1988).

102. *Id.* at 157.

103. *Id.* at 163.

104. *Id.* at 160.

judgments. Since Washington is the first American state to become a reciprocating state, the question, if it should arise, will be one of first impression. Dictum in *Weiner* suggests that Washington's new status as a reciprocating state may entitle Washington judgments to more favorable treatment under the modern rule stated in *Morguard*.

In *Weiner*, the judge stated, "In my opinion *Emanuel v. Symon* applies unless reciprocating states have been created by statutes such as our Court Order Enforcement Act."¹⁰⁵ Washington judgments may be entitled to treatment under the modern rule of "reciprocal jurisdiction" rather than the common law rule articulated in *Emanuel*.

Because paragraph (b) may still be a barrier to enforcement in the case of a defendant who does not submit to the jurisdiction of the Washington court, individuals who contract with British Columbia residents should take precautionary measures, such as providing a choice of forum clause in the contract. According to the rule in *Emanuel*, if the defendant has contracted to submit himself to the forum in which the judgment was obtained, then the defendant has submitted to the jurisdiction of that court.¹⁰⁶ By placing a choice of forum clause in the contract, the Washington judgment creditor can avoid any jurisdictional problems that might be raised by the judgment debtor under section 31(6)(b) of the Court Order Enforcement Act.

IV. CONCLUSION

The recent recognition of Washington as a reciprocating state under British Columbia's Court Order Enforcement Act should make it much easier to enforce Washington judgments in British Columbia. The ease of enforcing valid Washington judgments in British Columbia will be beneficial to Washington creditors specifically and to Washington-British Columbia commerce generally. If followed closely, the various procedural requirements of the Court Order Enforcement Act should cause few difficulties for Washington judgment creditors. While some substantive problems may arise in a dispute between a Washington judgment holder and a British Columbia defendant, the British Columbia courts should now allow

105. *Weiner v. Singh*, 22 C.P.C. 230, 238 (1981).

106. *Id.* at 234.

Washington judgments the same force and weight as judgments from other Canadian provinces.